



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

SUCCESSION CAUSE NO. 215 OF 2003

IN THE MATTER OF THE ESTATE OF MUNANGA OTATWA MUSA (DECEASED)

RULING

1. According to the certificate of death on record, serial number 375355, dated 12th July 1995, the deceased herein, Omunanga Otatwa Musa, died on 29th November 1991. According the letter from the Senior Chief of East Butsotso Location, dated 1st May 2003, the deceased was said to have had been survived by a widow, a daughter and three sons. The widow was named as Grace Ekhebani Munanga, the daughter as Meliza Owenza, and the sons as Samson Otatwa Munanga, Zadock Okore and Gabriel Andala Munanga the property he died possessed of was described as Butsotso/Indangalasia/349. Representation to the estate of the deceased was granted to the widow, Grace Ekhabali Munanga, and one of the sons, Samson Otatwa Munanga, on 14th June 2019, and a grant was issued, dated 18th September 2019.

2. What I am called upon to determine is a summons for confirmation of grant, dated 5th February 2020, filed herein on even date. It is brought at the instance of one of the administrators, Samson Otatwa Munanga. It is founded on two affidavits, both sworn on 5th February 2020, one by Samson Otatwa Munanaga, and the other by Samson Otatwa Munanga and Grace Khebali Omunanga. It is not clear why the administrators chose to file two affidavits. I shall disregard the affidavit sworn by one of the administrators, and I shall determine the matter based on the affidavit sworn jointly by the two administrators.

3. The list of the survivors of the deceased is longer than that provided by the Chief in the letter that I have referred to in paragraph 1 of this ruling. The Chief's letter disclosed three sons, but the affidavit in support of the application says that the deceased had seven sons. I wonder why the four sons introduced into the process through the affidavit in support of the summons were not disclosed in the Chief's letter and the petition. One of the duties of an administrator is to ascertain the persons beneficially entitled to a share in the estate, and I presume that the four sons were unearthed in the process of the said ascertainment. It is disclosed in paragraph 8 of the supporting affidavit that the deceased had a son known as John Okore Munanga, who had died. John Okore was not mentioned in the Chief's letter nor in the petition. He is said to have had left behind children, and it is proposed that his share be divided between Dickson Makunzo Okure, Robert Eronde Okure and Henry Tsalia. In a separate paragraph, it is averred that the said John Okore had a son known as Zaddock Chapia Okure, who died, and who was survived by a widow known as Jane Chapia, and two sons, known as Braitone Andole Jabia and Moses Munanga Jabia. The Chief's letter refers to a son of the deceased known as Zadock Okore, and so does the petition.

4. It is also averred that one acre of estate property had been sold to Edward Shapaya Andala and Godfrey Achevi Achesa, allegedly to raise money for administration purposes.

5. The property proposed for distribution is Butsotso/Indangalasia/349. The said summons provides for a schedule for distribution of the property as follows: -

- a) 0.5 acre, to Grace Khebali Munanga;
- b) 9.5 acres, to Samson Otatwa Munanga;
- c) 1.75 acres, to Wycliffe Munanga;
- d) 1.75 acres, to Albert Murunga Munanga;
- e) 1.75 acres, to Patrick Moi Munanga;
- f) 1.75 acres, to Joseph Oponyo Munanga;
- g) 4.5 acres, to Gabriel Andala Munanga;
- h) 1 acre, to Melisa Owenza Munanga;

- i) 2.5 acres, to Dickson Makunzo Okore;
- j) 1 acre, to Robert Eronde Okure;
- k) 2 acres, to Henry Tsalia Okure;
- l) 0.5 acre, to Jane Chapia;
- m) 1 acre, to Braitone Andole Jabia;
- n) 1 acre, to Moses Munanga Jabia;
- o) 0.5 acre, to Edward Shapaya Andala; and
- p) 0.5 acre, to Godfrey Achevi Achesa.

6. A consent on distribution, in Form 37, dated 5th February 2020, was filed, under Rule 40(8) of the Probate and Administration Rules, duly signed by sixteen individuals.

7. Directions were given on 10th February 2020, for disposal of the confirmation application by way of written submissions. Two parties did file their written submissions, which I have read through and noted the arguments made therein.

8. In confirmation applications, there are two principal factors for the court to consider: appointment of administrators and distribution of the estate. For avoidance of doubt, this is what section 71 of the Law of Succession Act, Cap 160, Laws of Kenya, says:

“Confirmation of Grants

71. Confirmation of grants

(1) After the expiration of a period of six months, or such shorter period as the court may direct under subsection (3), from the date of any grant of representation, the holder thereof shall apply to the court for confirmation of the grant in order to empower the distribution of any capital assets.

(2) Subject to subsection (2A), the court to which application is made, or to which any dispute in respect thereof is referred, may—

(a) if it is satisfied that the grant was rightly made to the applicant, and that he is administering, and will administer, the estate according to law, confirm the grant; or

(b) if it is not so satisfied, issue to some other person or persons, in accordance with the provisions of sections 56 to 66 of this Act, a confirmed grant of letters of administration in respect of the estate, or so much thereof as may be administered; or

(c) order the applicant to deliver or transfer to the holder of a confirmed grant from any other court all assets of the estate then in his hands or under his control; or

(d) postpone confirmation of the grant for such period or periods, pending issue of further citations or otherwise, as may seem necessary in all the circumstances of the case:

Provided that, in cases of intestacy, the grant of letters of administration shall not be confirmed until the court is satisfied as to the respective identities and shares of all persons beneficially entitled; and when confirmed such grant shall specify all such persons and their respective shares.”

14. The principal purpose of confirmation of grant is distribution of the assets. The proviso to subsection (2) of section 71 requires that the court be satisfied as to whether the administrator had properly ascertained all the persons beneficially entitled to a share in the estate and properly identified the shares due to them. The proviso is emphatic that the grant should not be confirmed before the court is satisfied on that account. The court, should, therefore, not proceed to address the matters that fall under section 71(2), if what is envisaged in the proviso has not been done. The provisions in the proviso have been reproduced in the Probate and Administration Rules at Rule 40(4) as follows:

“Where the deceased has died wholly or partially intestate the applicant shall satisfy the court that the identification and shares of all person entitled to the estate have been ascertained and determined.”

15. Has the proviso to section 71(2) of the Act and Rule 40(4) of the Probate and Administration Rules been complied with? I do not think that the persons beneficially entitled to the estate have been properly ascertained. The letter filed simultaneously with petition was from the Chief of East Butso Location, and it was dated 1st May 2003. It identified five individuals as survivors of the deceased, being a widow, a daughter and three sons. When the petition was lodged in court, the five individuals were identified in the affidavit sworn in support of the petition as the survivors of the deceased. I find it curious that at the point of proposing distribution the deceased is said to have had seven sons, and not the three mentioned in the Chief’s letter and in the petition. Does it mean that the Chief did not know the family of the deceased

well, and, therefore, did not disclose four of the sons of the deceased at the point of seeking representation? More crucially, the two administrators are the purported widow and son of the deceased. Does it mean that the widow did not know the number and names of her sons at the time she filed for representation, or if put differently, did she not know the number of the number and the names of the sons of the deceased? For the son, does it mean that he did not the number and the names of his brothers, so that at the time he was filing his petition he did not disclose them? Individuals ought not be introduced at confirmation of grant to the matter, when they were not disclosed at the initial stages of the process, without any explanation. Why were they not disclosed in the initial stages? Is it that the administrators did not know of their existence? Is it that the administrators only got to know that they existed only after representation was made to them?

16. These are issues that administrators ought not take lightly. Firstly, they are appointed administrators on the basis of the information that they disclose to the court at the time they are seeking representation. It is expected that the information they used to obtain representation would be the same information they would be relying on to have their grant confirmed. If the information changes between the time they filed the petition and the time they apply to have their grant confirmed, then they should account for that change in information, otherwise the court will be justified in suspecting that the administrators are not being truthful, and are manipulating information to suit some sinister agenda.

17. Secondly, let it not be forgotten that in intestacy, such as in the instant case, administrators hold office on appointment by the court. They continue to hold office at the mercy of the court, and that is why confirmation is not just about distribution of the estate, but confirmation of the administrators. Administrators are confirmed, by dint of section 71(2)(a) of the Law of Succession Act, based on an assessment of how they were appointed, and on account of how they have handled the estate. The fact of change of information between the date of appointment and the date they seek confirmation has something to do with their administration. They ought to account to the court, the appointing authority, about that. I am not talking about accounting from the blue. One of the duties stated in section 83 of the Law of Succession Act, is to render an account, by way of producing a full and accurate inventory of the assets and liabilities, and a full and accurate account of all dealings with the estate. This has to be done within six months of the making of the grant. The account has to coincide with the filing of the application for confirmation of grant. The administrators have to give explanations as to why the number of the sons of the deceased have jumped from three to seven. They need to come clean as to who the actual children of the deceased are.

18. Paragraphs 8 and 9 of the supporting affidavit serves to muddy the waters. They are about a son of the deceased known as John Okore Munanga. I am told that he is dead. This John Okore Munanga was not mentioned in the Chief's letter and in the petition. It is not clear how many children he had, for paragraph 8 mentions some individuals without being categorical as to whether they were his children or not. Paragraph 9 talks of a son. Just how many children did John Okore Munanga have? The names bandied about in paragraphs 8 and 9 are all for male individuals, were there any daughters? The administrators also need to come out clearly on who Zadock Okore was. He was listed in the Chief's letter and in the petition as a son, but in the joint affidavit, sworn on 5th February 2020, it would appear that he was a son of John Okore, and not the deceased. He could not be both a son and grandson of the deceased.

19. The proviso to section 71(2) of the Law of Succession Act talks about ascertainment of beneficiaries and also of their shares. I have seen the proposed sharing indicated in paragraphs 7, 8 and 9 of the joint affidavit of 5th February 2020. Other than Grace Khebali Munanga and Jane Chapia, who are widow of the deceased and, I suppose, daughter-in-law, respectively, of the deceased, the rest take as or on behalf of children of the deceased. The distribution proposed amongst the children is uneven. One takes 9.5 acres, another 4.5 acres, another 2.5 acres, another 2 acres, another 1 acre, and so on. The deceased died in 1991, ten years after the Law of Succession Act became effective on 1st July 1981. His estate fell for distribution strictly in accordance with Part V of the Law of Succession Act. Under section 35, the surviving widow is entitled to a life interest in the net intestate estate, and the property ultimately passes to the children, under section 35(5) in equal shares. Section 38 is also relevant; it envisages equal sharing amongst the children. The law is gender neutral; it envisages that daughters take equally with the sons. There is no discrimination based on gender. No explanation has been given for the very unequal distribution proposed across the board, which is completely contrary to what sections 35(5) and 38 envisage. Such discrepancy in distribution, as between what the law provides and what the administrators propose, must be explained. Filing a consent on distribution bearing such huge discrepancies is not enough. A narrative must be given in the affidavits as to why that should be so.

20. For avoidance of doubt, sections 35(5) and 38 state as follows:

“35. Where intestate has left one surviving spouse and child or children

(1) Subject to the provisions of section 40, where an intestate has left one surviving spouse and a child or children, the surviving spouse shall be entitled to—

(a) the personal and household effects of the deceased absolutely; and

(b) a life interest in the whole residue of the net intestate estate: Provided that, if the surviving spouse is a widow, that interest shall determine upon her re-marriage to any person.

(2) ...

(3) ...

(4) ...

(5) Subject to the provisions of sections 41 and 42 and subject to any appointment or award made under this section, the whole residue of the net intestate estate shall on the death, or, in the case of a widow, re-marriage, of the surviving spouse, devolve upon the surviving child, if there be only one, or be equally divided among the surviving children.

36. ...

37. ...

38. *Where intestate has left a surviving child or children but no spouse*

Where an intestate has left a surviving child or children but no spouse, the net intestate estate shall, subject to the provisions of sections 41 and 42, devolve upon the surviving child, if there be only one, or shall be equally divided among the surviving children.”

21. The other thing is that it would appear that 1 acre of Butso/Indangalasia/349 was sold to the two individuals named in the joint affidavit of 5th February 2020. No details are given as to when the said property was sold, for what consideration, what the moneys raised was used for, *et cetera*. In short an account ought to have been rendered. The dealings with the estate that section 83(e) talks about, for which an account is required within six months, includes such sale of estate property. That account should be complete with copies of sale agreements. There must be proof that estate property was in fact sold. It is not enough to just depose in any affidavit that there was a sale. Evidence of that sale must be provided, and actual accounts presented of how much money was received as consideration, and how it was utilized, and for what purpose, backed by requisite accounting documents.

22. Section 83(e) says:

“83. Duties of personal representatives

Personal representatives shall have the following duties—

(a) ...

(b) ...

(c) ...

(e) within six months from the date of the grant, to produce to the court a full and accurate inventory of the assets and liabilities of the deceased and a full and accurate account of all dealings therewith up to the date of the account;

(f) ...

(g) ...

(h) ...

(i) ...”

23. More importantly, section 82 (b)(ii) of the Law of Succession Act prohibits sale of immovable estate assets before confirmation of grant. Estate assets can only be disposed of, after confirmation of grant, either by the administrators or by the individual beneficiaries to whom such property has been devolved. Section 82 (b)(ii) is in mandatory terms. If immovable assets have to be sold before grant is confirmed, then permission of the court must be sought and obtained, because the law says that the administrators have no authority to sell such assets before the grant is confirmed. An administrator cannot causally say, in a confirmation application, that they sold immovable estate assets, without providing proof that they had leave of court to dispose of such assets. So, did the administrators herein obtain leave of court before they transacted with the two individuals named in the joint affidavit as purchasers of the immovable property of the estate? If they did obtain such leave, where is the proof? In such matter as this the court should not act on mere narratives, there must be concrete proof. Car, livestock and other movables can be sold before confirmation, not so with immoveable assets.

24. Section 82(b)(ii) states as follows:

“82. Powers of personal representatives

Personal representatives shall, subject only to any limitation imposed by their grant, have the following powers—

(a) to enforce, by suit or otherwise, all causes of action which, by virtue of any law, survive the deceased or arising out of his death for his personal representative;

(b) to sell or otherwise turn to account, so far as seems necessary or desirable in the execution of their duties, all or any part of the assets vested in them, as they think best:

Provided that—

(i) ...

(ii) *no immovable property shall be sold before confirmation of the grant.*”

25. I wish to reiterate that administrators in intestacy are appointed by the court. They derive authority and mandate to act from the court through the grant of letters of administration intestate, and, therefore, they have an obligation to account to the court of the exercise of power under the grant which appointed them. Secondly, administrators hold assets in trust. They are trustees with respect to such property. They stand in a fiduciary position with respect to the assets the subject of the trust. They hold it for the benefit of all the persons who are beneficially entitled to the same, be they heirs, survivors, dependants, beneficiaries or creditors. A fiduciary has a duty to account with respect to their dealings with the property that they hold under the grant for the benefit of those others. It is not their property. It is property they hold for the benefit of others. They have to render an account for the benefit of the court, so that the court gets to know how the administrators have carried out their mandate. They are also accountable to the persons on whose benefit they hold the property, so that they get to know how the property held on their behalf has been handled, and especially to have it made known to them that the same was safe in the hands the administrators. It is a solemn duty that the administrators should approach with the seriousness that it serves, I do not think that the administrators herein have taken this duty seriously, given the casualness that is clearly in display in the confirmation application that is before me. The provisions in sections 71, 82 and 83 are not meaningless. They have to be complied with and given effect. The administrators herein are on slippery ground. They risk not being confirmed should they fail to comply with the requirements of the proviso to section 71(2) and Rule 40(4) of the Probate and Administration Rules.

26. The final word. It is important for the parties to appreciate that confirmation of grant is the most critical of the processes of administration. The whole essence of administration of estates and initiation of succession proceedings is distribution of the estate of the deceased amongst the individuals beneficially entitled. Confirmation paves the way for such distribution. Confirmation is about distribution, the *raison detre* for the whole exercise of administration. It is the most important stage in the whole process. It must be done properly and correctly, otherwise it will not leave the parties at peace. Succession proceedings last forever where confirmation proceedings are mishandled by both the parties and the court parties. An effort must be made to ensure that all the relevant statutory provisions relating to it are fully complied with.

27. In view of what I have stated above, it should be obvious that I cannot confirm the grant at this stage. The administrators ought to satisfy the requirements of the proviso to section 71(2) of the Law of Succession Act first before I can get to the next stage, of considering whether I should confirm the administrators to carry on with administration up to distribution, and whether I should approve the distribution proposed. The issues raised are grave. They cannot be disposed of by merely looking at the affidavits and written submissions. Rule 41(1) of the Probate and Administration Rules requires the court to hear, at the confirmation hearing, the applicant administrators, protestors and any other person interested in the estate. So, before I confirm the grant herein, the administrators will have to cause all the persons beneficially interested in the estate to attend court at the hearing of the application, so that I can hear each one of them orally on the said application, before I make the final orders.

28. The orders that I make at this stage are as follows:

(a) That the application dated 5th February 2020 is hereby postponed, in terms of section 71(2)(d) of the Law of Succession Act;

(b) That the administrators shall file, within thirty (30) days, an affidavit to address all the issues that I have raised in this ruling; and

(c) That the matter shall be mentioned thereafter, on a date to be given at the registry on priority, for compliance and for allocation of a date when the confirmation application shall be heard orally.

DELIVERED, DATED AND SIGNED IN OPEN COURT AT KAKAMEGA THIS 19TH DAY OF MARCH 2021

W MUSYOKA

JUDGE